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No. 07-871

FILED
JAN 2 8 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

JOYCE EVANS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Federal law requires any person selling raisins in interstate commerce to transfer a fraction of her annual crop—sometimes as much as 50%—to the government's sole possession as a condition for selling the remaining raisins in "interstate commerce." Is the confiscation of Petitioners' raisins a compensable taking of private property in violation of the Fifth Amendment, or is it a voluntary program under which farmers merely pay an "admission fee" in exchange for the opportunity to sell the raisins that they have grown?

2. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that a property owner who obtains property knowing of the existence of a confiscatory regulation governing that property is thereby barred from seeking just compensation. The decision below holds that a business that enters a market that is governed by a confiscatory regulation is thereby barred from seeking compensation. Is the decision below contrary to the rule articulated in *Palazzolo*?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Washington State, Florida, Hawaii, and a liaison office in Alaska.

PLF attorneys actively engage in research and litigation over a broad spectrum of public interest issues, and particularly on matters of private property rights and economic liberty. PLF attorneys have written extensively on property rights and the right to economic freedom. *See, e.g.*, Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* (2006); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Envtl. Aff. L. Rev. 1 (2002). PLF attorneys devote substantial resources to litigating these matters by

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

appearing as counsel or as amicus curiae in cases before federal and state courts. For example, PLF attorneys represented property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and appeared as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and virtually every other major property rights case heard by this Court in the last twenty-five years. PLF was granted leave to appear as amicus curiae in this case by both the Court of Claims and the Federal Circuit. Written consent for the filing of this brief was granted by counsel for all parties and lodged with the Clerk of the Court.

SUMMARY OF THE CASE

Every year, a significant portion—often half—of the entire California raisin crop[2] is confiscated by the federal government for the sole purpose of making raisins more expensive. *See Lion Raisins, Inc. v. United States*, 58 Fed. Cl. 391, 394 (2003) ("By regulating the amount of raisins in this market, the [government] can, in effect, regulate the price at which raisins are sold domestically."); Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 6 (1995) (The "primary focus" of the market control program at issue here is "to maximize return to the grower.").

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[2] California's San Joaquin Valley is the world's largest producer of raisins, providing half of all raisins. *See* Cal. Raisin Marketing Board, *available at* http://www.calraisins.org/about_us/industry_information/history.cfm (last visited Dec. 21, 2007).

This taking is carried out pursuant to "marketing orders" adopted by the United States Department of Agriculture (USDA) and administered by the USDA's Raisin Administrative Committee (RAC), which sets an annual percentage of the raisin crop that growers must relinquish before they may sell their raisins in interstate commerce. In 2005, the RAC designated 17.5% of raisins for transfer to the government. *See* Raisin Administrative Committee, *Analysis Report August 1, 2006*, at 55 (Feb. 2007).[3] In 2002 it was 47%; in 1983, 62.5% of all raisins were taken by the RAC under this program. *Id.*

The law requires that the raisins be surrendered when growers transfer their crop to packers, who prepare the raisins for the retail market. Once taken, the raisins are sold under a government-owned brand name, and the proceeds of these sales are then used to subsidize American raisin producers who sell raisins overseas. *Lion Raisins*, 58 Fed. Cl. at 394. What money remains after these subsidies is then returned to the farmers whose raisins were confiscated. *Id.* The money returned is therefore only a fraction of the actual value of the seized raisins. *Id.*

The Petitioners filed this suit in the Court of Claims arguing that they were not being paid the just compensation to which they are constitutionally entitled. But the court dismissed the case, holding that they had *voluntarily relinquished* their raisins by choosing to sell raisins in interstate commerce, and thus subjecting themselves to the marketing order mechanism. *Evans v. United States*, 74 Fed. Cl. 554,

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[3] *Available at* http://www.raisins.org/Analysis_report/Analysis_report.pdf (last visited Dec. 21, 2007).

564 n.16 (2006). The court interpreted the farmers' right to sell their crop as a privilege, rather than a right, and held that the confiscation of their raisins was a "toll" or "admissions fee" for the privilege of selling their raisins in "interstate commerce." *Id.* at 563-64. The Federal Circuit affirmed without opinion. *Evans v. United States*, No. 2007-5045, 2007 WL 2908212, at *1 (Fed. Cir. Oct. 4, 2007).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The basic question in this case is whether the confiscation of Petitioners' raisins can be described as voluntary. The Court of Claims found that although a regulation of commerce whereby government converts a physical asset might qualify as a compensable taking, the Petitioners here waived their rights to compensation. There were essentially two interrelated grounds for this conclusion: *First*, the Petitioners were aware of the existence of the confiscation requirement when they chose to enter the market, and cannot therefore be heard to complain of the taking. *Evans*, 74 Fed. Cl. at 563-64. *Second*, access to the interstate market is a privilege for which the government can require an "admissions fee." *Id.* These holdings warrant *certiorari* review by this Court for four reasons.

1. In *Palazzolo*, 533 U.S. 606, this Court rejected the notice/consent rule under which a property owner was blocked from seeking compensation for regulatory takings if he took title to land knowing of the existence of a confiscatory regulation. Such a rule, the Court declared, would allow government "to put an expiration date on the Takings Clause," *id.* at 627, and to misconstrue property rights (the taking of which

government must pay for) as privileges (for which an individual may be forced to pay). *Id.*

Nevertheless, some lower courts—including the Court of Claims here—continue to apply this notice/consent rule to bar legitimate takings claims on the theory that a property owner "consents" to the taking of her property if she is on "notice" of the existence of a confiscatory regulation and chooses to exercise the rights of ownership. *See, e.g., Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001); *Hallco Texas, Inc. v. McMullen County, Texas*, 94 S.W.3d 735, 738 (Tex. App. 2002), *aff'd* 221 S.W.3d 50 (Tex. 2006). Other courts have declined to apply this notice/consent rule, including the First, Eleventh, and Federal Circuits, which directly conflict with the decision here. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 47 (1st Cir. 2002) (en banc); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999).

The contrary conclusion reached by the Court of Claims in this case would transform virtually every taking into a noncompensable "voluntary" relinquishment of property. This Court rejected that proposition not only in *Palazzolo*, but also in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982), and *Nollan*, 483 U.S. at 833 n.2.

2. Even if the Petitioners' right to sell their raisins *were* properly characterized as a privilege rather than a property right, the decision below conflicts with repeated holdings by this and other courts in such "unconstitutional conditions" cases as *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001), *Dolan v. City of Tigard*, 512 U.S. 374, 385

(1994), *Reilly*, 312 F.3d at 47, and *Gulf Power*, 187 F.3d at 1331. Those cases hold that government "may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit." *Dolan*, 512 U.S. at 385. Yet the Court of Claims concluded that a farmer's right to sell the raisins she has grown is a privilege which can be conditioned on a burdensome "toll"—namely, the uncompensated seizure of a substantial portion of her raisin crop. This conclusion is particularly onerous given that the regulations at issue, combined with this Court's broad interpretation of "interstate commerce," mean that Petitioners *could not possibly have avoided* "consenting" to the taking of their raisins if they had tried. Both the Court of Claims and the Federal Circuit failed to address the unconstitutional conditions issues in their decisions despite briefing on the subject.

3. Demands for just compensation under this program can be brought only in the Federal Court of Claims and appealed from there to the Federal Circuit, meaning that other circuits will not normally have an opportunity to consider this issue prior to this Court's review, and the decisions of the Federal Circuit will otherwise settle the law. There is little reason, therefore, to allow these issues to remain with the courts of appeals for further consideration prior to review on certiorari.

4. This case involves an unusually important federal government program. The agricultural adjustment mechanism at issue here involves the seizure of more than 17%, and often half, of the Petitioners' entire raisin crop—which is to say, half of

the entire raisin crop of the United States—solely for the purpose of increasing the domestic price of food. Bensing, *supra*, at 6. This is significant not only given the intrinsic importance of the supply of foodstuffs at affordable prices, but also the existence of many similar programs governing the production of almonds, peaches, and other agricultural products.

ARGUMENT

I

CERTIORARI IS WARRANTED TO CLARIFY THAT THE "NOTICE RULE" APPLIES ONLY TO RESTRICTIONS OF GOVERNMENT PRIVILEGES AND *NOT* TO TAKINGS OF PROPERTY RIGHTS

The decision below holds that the Petitioners constructively consented to the taking of their raisins by choosing to enter the interstate market which they knew was governed by the confiscation requirement. *Evans*, 74 Fed. Cl. at 564 n.16. The government "does not force plaintiffs to grow raisins or to market the raisins," the court concluded; it merely "directs that *if* they grow and market raisins, then passing title to their 'reserve tonnage' raisins to the RAC is their admission ticket" to the interstate market. *Id.* at 564. Because they were on notice of the existence of this requirement, the Petitioners consented to the taking of their raisins, and were therefore barred from seeking compensation. This notice/consent rule, however, is contrary not only to repeated decisions of this Court, but to the decisions of the First, Eleventh, and Federal Circuits, which have restricted the rule to a narrow class of cases readily distinguishable from this one.

A. This Court Has Repeatedly Declared That the "Notice"/"Consent" Rule May Not Bar Compensation for Takings of Property Rights

The notice/consent theory adopted below is essentially the same rule which this Court has repeatedly rejected in property rights cases—most notably in *Palazzolo*, 533 U.S. 606, but also in *Loretto*, 458 U.S. at 439, and *Nollan*, 483 U.S. at 833 n.2. Under this rule, a property owner who gains title to property while aware of the existence of a confiscatory regulation (*Palazzolo*), or who enters a market that is governed by a confiscatory rule (*Loretto*), is purportedly barred from seeking just compensation for that taking. Despite frequent repudiation by this Court and some courts of appeals, that rule is still often applied by other lower courts, including the court below. This warrants *certiorari* review. *Cf. Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted where lower courts "conflict[ed] in principle"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 846 (1974) (same).

The notice/consent rule originated in a misunderstanding of this Court's decision in *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), which found that the Monsanto company could not have formed a "reasonable investment-backed expectation" that the government would refrain from ordering the disclosure of its trade secrets, since the company was aware of the possibility that Congress might order disclosure and had chosen to take that risk in exchange for certain government benefits. In *Nollan*, 483 U.S. at 833 n.2, this Court reiterated that the *Monsanto* notice/consent rule applies only when the

property at issue is a "'*[g]overnment benefit*,'" *id.* at 833 n.2 (citation omitted), and does *not* apply to takings of property rights. Whereas Monsanto had sought to register its insecticide for a special government license, the property owners in *Nollan* were seeking a building permit, and "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'" *Id.* (citation omitted). Thus the notice/consent rule could not cut off their rights.

This Court emphasized the limitations on the notice/consent rule in *Palazzolo*, when it found that the fact that a party knew of a land-use regulation before taking title to property was not enough to bar the person from demanding just compensation. Applying the notice/consent rule outside the context of government *privileges* was inappropriate, the Court held, because it would "put . . . a Hobbesian stick into the Lockean bundle" of property rights. 533 U.S. at 627.[4] The "Hobbesian stick" is the notion that property rights are simply government "privileges." Conflating these two categories would lead to a state of affairs where "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to

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[4] In her concurring opinion in *Palazzolo*, Justice O'Connor held that a property owner's awareness of the existence of a confiscatory rule might be considered as one among many elements in a court's consideration of a regulatory taking. 533 U.S. at 633. Since this case involves a *physical* taking, such an analysis would not apply. But even if it did, this Court should grant certiorari to clarify under what circumstances a property owner's awareness of existing regulations should defeat a takings claim. A rule articulated only in a concurring opinion leaves lower courts in doubt as to the proper analysis.

put an expiration date on the Takings Clause. This ought not to be the rule." *Id.* Thus, while awareness of the existence of a regulation might cut off the rights of those seeking government privileges, as in *Monsanto*, it does *not* cut off the rights of those who seek protection for property rights arising from some other source.

That this reasoning is not confined to the land-use context is made clear by *Loretto*. There the government argued that the landowner constructively consented to the taking of her property because she was aware of the rule requiring the permanent physical invasion of her property when she chose to enter the market by renting it out, 458 U.S. at 438-39—the same argument adopted by the court below in this case. This Court rejected that theory: "It is true," wrote Justice Marshall for the majority, "that the landlord could avoid the requirements . . . by ceasing to rent the building to tenants. *But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.*" *Id.* at 439 n.17 (emphasis added). The contention that the taking was simply part of an economic regulation "prove[d] too much," because under that theory the government could

> require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices.

Id. The rights of property owners "cannot be so easily manipulated." *Id.*

Here, the conclusion that a property owner who seeks to sell her produce must "pay[] . . . a toll" for the privilege, *Evans*, 74 Fed. Cl. at 563-64, likewise proves too much and would enable the government to require virtually any concession from a party who engages in commercial activity. This Court has repeatedly held that the principle of unconstitutional conditions does not allow government to demand such concessions from property owners in exchange for permission to use their property. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 385.

B. Some Federal and State Courts Continue to Misapply the Notice/Consent Rule in Property Rights Cases, While Others Have Properly Limited It to Government Privilege Cases

Although *Nollan*, *Palazzolo*, and *Loretto* make clear that mere awareness of the existence of a confiscatory regulation cannot bar a property owner's pursuit of just compensation—or qualify as "consent" to the taking—lower courts are still in disarray[5] as to

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[5] In addition to those cases cited in the text, cases **rejecting** the notice/consent rule in the property rights context include *Rucci v. City of Eureka*, 231 F. Supp. 2d 954, 957 (E.D. Mo. 2002); *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 352-53 (Ohio 2002); *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 793 A.2d 545, 555-60 (Md. 2002). Cases **applying** the notice/consent rule in the property rights context include *TG Dev., L.L.C. v. Charter Twp. of Mt. Morris*, No. 243019, 2004 WL 594950, at *10 (Mich. Ct. App. Mar. 25, 2004); *Centeno v. City*

(continued...)

the applicability of the notice/consent rule in suits for just compensation. *See generally* J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351, 409-17 (2005).

Phillip Morris, Inc. v. Reilly, 113 F. Supp. 2d 129 (D. Mass. 2000), presents a case similar to this one, and demonstrates the confusion that remains in lower courts regarding the notice/consent rule. There, the district court found that a Massachusetts law requiring tobacco companies to disclose the ingredients of their products effected a regulatory taking. The government argued that the companies were aware of the disclosure requirement when they chose to sell their products in Massachusetts, and therefore had effectively consented to the taking, *id.* at 144, but the trial court rejected this theory as a misapplication of the *Monsanto* notice/consent rule: " '[P]ermission to continue operating a lawful business is not the type of government benefit' " to which the notice/consent rule could apply, the court concluded. *Id.* (quoting *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 679 (1st Cir. 1998)). The idea that a business' awareness of the existence of a confiscatory rule thereby cut off that business' right to just compensation "rests on the positivist notion[6] that since, in a broad sense, all property rights emanate from the State, the State is

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[5] (...continued)
of Alamo Heights, No. 04-02-00677-CV, 2004 WL 624554, at *2 (Tex. App. Mar. 31, 2004).

[6] This "positivist notion" is the same "Hobbesian Stick" rejected by this Court in *Palazzolo*, 533 U.S. at 627.

free to take them away whenever it determines to do so. That proposition must be rejected." *Reilly*, 113 F. Supp. 2d at 145.

That decision was initially reversed by the First Circuit, which held that the notice/consent rule *did* bar the plaintiff's claims because "the ability to market tobacco products in Massachusetts" *was* a privilege for which the state could demand concessions from the tobacco companies. *Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 59 (1st Cir. 2001). But this panel decision was then reversed by the *en banc* court, 312 F.3d 24, which reinstated the district court's opinion and found that the notice/consent rule did *not* apply. "[A]llowing a manufacturer to simply sell its legal product" is a right inhering in ownership, "similar to building on one's land," and is not "a valuable government benefit" which can be conditioned on the taking of property. *Id.* at 47. The state's attempt to "condition the right to sell tobacco on [a] forfeiture" was "an unconstitutional taking of the tobacco companies' products." *Id.*

This conclusion was consistent with *Harshbarger*, which also found that the right to sell one's products in a market is not a privilege which can be conditioned on a taking of property: "[T]he state's self-interested characterization of a right as a benefit," *Harshbarger* concluded, could not transform a property right—which must be paid for when taken—into a privilege for which the government can demand a fee. 159 F.3d at 677.

The decision in this case conflicts directly with *Harshbarger* and *Reilly* by holding that the raisin growers were aware of the confiscatory requirement and therefore constructively consented to the taking of

their raisins by entering that market. The First Circuit held that "[t]he ability to conduct (and, more especially, to continue to conduct) a lawful business . . . though subject to some governmental requirements, simply is not analogous" to the granting of a government benefit, and cannot be conditioned on the relinquishment of a property right, *id.* at 677. But the Federal Circuit in this case held that the ability to conduct lawful business selling raisins in the United States is a privilege which can be conditioned on the confiscation of Petitioners' property.

The Eleventh Circuit also rejected the notice/consent theory in *Gulf Power*, 187 F.3d 1324. There, the court found that a federal law which required utility companies to allow their wires to be accessed by cable television companies effected a compensable taking of the utility companies' property. The government contended that the utility companies chose to enter into the marketplace and thereby voluntarily relinquished their rights to just compensation. *Id.* at 1331. But, citing *Loretto*, the court concluded:

> [P]rotection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property . . . . [T]he bundle of rights that a utility has in its property includes the right to permit its use for wire communications, and exercise of that right may not be conditioned on being forced to submit to a permanent, physical occupation of its property without payment of just compensation.

Id. That conclusion is flatly contrary to the decision here, which holds that the raisin growers *may* be forced

to consent to the permanent physical seizure of their raisins in exchange for the right to sell the remaining raisins.

The Federal Circuit itself has also rejected the notice/consent rule in property rights cases, which means that this case creates a conflict within the Federal Circuit itself. In *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), property owners whose government mortgages included a provision allowing them to pay off their mortgages early sued when a federal law eliminated this provision. There was no question that the owners voluntarily participated in the government program. *Id.* at 1330. Moreover, the government argued that " 'enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control.' " *Id.* But the Federal Circuit rejected this argument as one that "eviscerates century-old understandings of the stable and enduring nature of contract and real property rights." *Id.* at 1331. The court took "particular issue with the government's position that the Owners had no property interest because '[t]he prepayment provision contained in the [contracts] did not exist independently of, but rather was *subject to*, *limited by*, and *totally dependent upon*, [the] regulatory regime,'" *id.*—that is, that the prepayment option (like the sale of raisins here) was a privilege and not a right, and that the property owners had constructively consented to the unilateral elimination of their contract rights. This, the court declared, "cannot be, and is not, the law." *Id.* at 1331. The "regulated nature" of a given market is not "a talisman" that enables government to take assets without compensation. *Id.* at 1334. The

decision below—that the Petitioners knowingly entered a market that was subject to a confiscatory regulation and therefore that they are not entitled to compensation—therefore conflicts fundamentally with *Cienega Gardens*.

This division of authority regarding the applicability of the notice/consent rule is exacerbated by decisions of several state courts, some of which have applied the rule to bar compensation for regulatory takings even after *Palazzolo*. In *Sanderson*, 787 A.2d at 169, the New Hampshire Supreme Court found that a property owner had constructively consented to the taking of her property when she took title to land with knowledge of the existence of a severe land-use restriction. "The plaintiff purchased the property knowing both of the ordinance's frontage requirements and that the property lacked the required frontage," the court declared. "Thus, she purchased the hardship of which she now complains." *Id.* Likewise, the Texas Court of Appeals applied the notice/consent rule to bar a landowner's takings claim in *Hallco Texas*, when it found that a property owner could not form a compensable "investment-backed expectation" if she was aware that going into business would require the grant of a land-use permit. 94 S.W.3d at 738-39. The fact that the owner was aware of the requirement meant that government action denying the right to use the property "did not constitute a taking as a matter of law." *Id.* at 738. To name only one of many more examples, the Illinois Court of Appeals rejected a takings claim brought by a landowner on the grounds that "owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property" in *Town of Georgetown v. Sewell*, 786 N.E.2d 1132, 1141 (Ind. Ct. App. 2003).

Certiorari is warranted here to clarify whether the *Monsanto* notice/consent rule applies in to takings claims involving not privileges but property rights.

C. The Characterization of the Taking of Petitioners' Raisins as "Voluntary" Creates a Significant Threat to the Viability of the Just Compensation Requirement

To understand the Court of Claims' holding that the Petitioners essentially consented to the confiscation of their raisins by choosing to sell them in interstate commerce, it is necessary to understand how the raisin marketing order scheme works.

Under the Agricultural Marketing Agreement Act (7 U.S.C. § 601, *et seq.*), any person may propose that the USDA establish a cartel for the sale of an agricultural product by petitioning for the creation of a marketing order. The marketing order, once adopted, applies to all producers in the market, whether or not those others agree with the marketing order proposal. *See* 7 C.F.R. § 900.3(a) (2007). Once a proposal is accepted by the USDA, the law provides for a referendum where growers may debate the proposed cartel agreement, but the Act allows agricultural cooperatives to bloc-vote in the referendum on behalf of all its members. *See Cecelia Packing Corp. v. USDA*, 10 F.3d 616, 619 (9th Cir. 1993). Since "there will not infrequently be a single cooperative corporation that dominates the production of the commodity," Bensing, *supra*, at 13, this provision allows cooperatives to override their members' actual preferences, and to muster the votes necessary to adopt or reject proposed marketing orders regardless of their constituents' desires.

Small-scale entrepreneurs are at an even worse disadvantage, since they lack political leverage within the agricultural community. Thus a grower who wishes to operate independently from her competitors is inherently and systematically excluded by what amounts to an agricultural guild system. *See further* Dennis M. Gaab, *The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets for Agricultural Commodities*, 5 San Joaquin Agric. L. Rev. 119, 133-34 (1995) (noting case in which Sunkist bloc vote kept marketing order in place against the will of most growers). Courts have abetted this unfairness by refusing to accord the voting rights of dissenting growers the same strict scrutiny accorded to the right to vote in other governmental elections. *See, e.g., Cecelia Packing*, 10 F.3d at 624-25.

The purported "voluntariness" involved in the marketing order scheme is therefore illusory. A grower who does not wish to have her production subsumed within the cartel that another grower proposes has no realistic choice. Once that proposal is advanced and adopted by the USDA, she is subject to it. Her only hope for independence is to prevail at the referendum—where she will be overwhelmed by self-interested competitors and the unfairly weighted votes of conglomerates. As Professor McCloskey pointed out, "the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50. To hold that they can "defend themselves through political action is to sacrifice their civil rights in the name of an amiable fiction." *Id.*

Dismissing this takings claim on the theory that the growers "choose" to participate in the program is analogous to denying compensation in an eminent domain case on the theory that a homeowner who voted against a citywide referendum on a development project, but was outvoted, thereby "volunteered" to have his property taken.

Finally, the broad scope of the federal power to regulate commerce also renders any "choice" that the Petitioners might have utterly illusory. The Claims Court's assertion that the Petitioners chose to enter the interstate market suggests that they could have chosen otherwise. But the virtually limitless regulatory power accorded Congress under the Commerce Clause, particularly after this Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), makes this no choice at all. The Petitioners could *not* have avoided the seizure by choosing a "purely intrastate" market for selling their raisins, since even the production and sale of raisins only within a state is still subject to regulation under the Commerce Clause. *See id.* at 18-19; *see also* 7 C.F.R. § 989.14 (2007) (applying reserve requirements to "any person who, within the area [*i.e.*, California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins"). Under *Wickard v. Filburn*, 317 U.S. 111, 115 (1942), and *Raich*, even if the Petitioners were to sell directly to pedestrians walking past their vinyeards, they would fall under the requirements of the raisin seizure rule.

Wickard and other cases have been predicated on the rationale that there are few if any logical dividing lines between intrastate and interstate commerce in a modern economy. The Court of Claims cannot

therefore posit some clear distinction between the two and then declare that Petitioners have sought entry into the interstate market, for which they must pay a "toll." In fact, Petitioners have only a Hobson's choice: if they choose to sell their raisins *at all*, they enter interstate commerce, and are subject to the Act and the confiscation requirement.

II

EVEN IF THE RIGHT TO SELL THEIR PROPERTY IS CHARACTERIZED AS A "PRIVILEGE," THE DECISION BELOW CONFLICTS WITH DECISIONS BY THIS COURT AND CIRCUIT COURTS REGARDING THE "UNCONSTITUTIONAL CONDITIONS" DOCTRINE

The Court of Claims based its holding on the conclusion that for Petitioners to sell the raisins that they have produced is a privilege rather than a right. *See Evans*, 74 Fed. Cl. at 563-64 ("[P]laintiffs are paying an admissions fee or a toll—admittedly a steep one—for marketing raisins."). This holding conflicts with centuries of Anglo-American jurisprudence, which holds that the producer of a lawful product has an inherent right to sell that product, unless he or she voluntarily relinquishes that right. *See, e.g.*, William Blackstone, 2 *Commentaries* *447 ("Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner."); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property . . . has been part of the Anglo-American legal system since feudal times."); *Hinkle Northwest, Inc. v. SEC*, 641 F.2d 1304, 1307 (9th Cir. 1981) ("'Ownership

is a collection of rights to use and enjoy property including the right to sell and transmit the same.' " (citation omitted)). There is no right more firmly rooted in this nation's history and tradition than the right of an agricultural producer to market his or her product.

Nevertheless, even if the right to sell an owned item is merely a privilege, that privilege may not be conditioned on the waiver of constitutional rights. As this Court has put it, government "may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit." *Dolan*, 512 U.S. at 385.

In *Reilly*, the First Circuit found that the government could not require a forfeiture in exchange for the right to sell a product in the marketplace, directly conflicting with this case. 312 F.3d at 46 (en banc). *See also Pharm. Care Mgmt. Ass'n v. Rowe*, No. 03-153-B-H, 2005 WL 757608, at *10 (D. Me. 2005) (interpreting *Reilly* as holding that "there is a constitutional right under the Takings Clause to access a state's markets without having first to satisfy a taking condition"). Similarly, in *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005), the Sixth Circuit Court of Appeals found that a city's decision to withhold certain permit approvals from the proprietors of a bar unless they agreed to close the bar at 11 p.m. was an unconstitutional condition. *Id.* at 436. Even though the bar did not have a constitutional right to a liquor license, *id.* at 434, the city's attempt to restrict the business' ability to operate was an unconstitutional condition:

> [The city] cannot indirectly force [the bar] to close at 11:00 p.m. by withholding government benefits . . . . The due process violation at issue is the city's alleged requirement that [the bar] choose between its due process rights in certain hours of operation and the desired city approvals.

Id. at 436. Thus, both the First and Sixth Circuits have held that a party's access to a market is one of the constitutional interests secured by the unconstitutional conditions doctrine, contrary to the decision below.

Although the unconstitutional conditions doctrine was briefed in the court of appeals, that court affirmed without opinion. Given the "uncertainties surrounding application of the unconstitutional conditions doctrine," *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 279 (1998), certiorari is warranted to resolve whether the raisin growers could be required to relinquish their right to just compensation in exchange for access to the interstate market.

Indeed, the unconstitutional conditions doctrine is particularly important here, because, as explained above, the Petitioners *could not have avoided* the confiscation requirement. *Cf. Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985) (lack of genuine choice is particularly significant in unconstitutional conditions analysis); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1428 (1989) ("[T]he Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect."). Since selling agricultural products *at all* is virtually *per se* interstate commerce, the Petitioners would have been subject to the confiscation requirement no matter how they chose to

sell their raisins. This lack of choice implicates the unconstitutional conditions doctrine with particular force.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

DATED: January, 2008.

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